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No. 71-838

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1971

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL PADEV,

Appellants,

v.

WADE CHURCH,

Appellee.

On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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I

Point 1 — That the appeal is "contrived."

Appellee states that the state courts did not rule on the constitutionality of Arizona Civil Rules of Procedure 50(a) and 50(b). We agree the trial court adhered to the long-accepted limitation upon the power of a trial judge in ruling on a Motion

for a Directed Verdict or for Judgment Notwithstanding the Verdict. We also agree that the Arizona Supreme Court refused to consider the claim that Rules 50(a) and 50(b) as construed by it contravened the First Amendment rights of appellants by denying to the trial court the right to make a judicial appraisal of the sufficiency of the evidence to determine if it met the *Times v. Sullivan,* 376 U.S. 254, standards upon its consideration of these motions in the trial court. The trial court had routinely denied the motions.

Contrary to appellee's assertions, the central purposes of appellants' Petition to the Arizona Supreme Court for a Special Action were (a) to seek a review of the failure of the trial court to apply *Times v. Sullivan* standards in ruling upon appellants' Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict because of the limitation upon its power imposed by Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure; and (b) (and most importantly) to squarely tender to the Arizona Supreme Court the question as to whether or not the Court might, because of the grave constitutional questions involved, make an exception to its self-imposed "law of the case" limitation restricting its power to reconsider a prior decision.[1]

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[1] Appellants' Petition for Special Action alleged:

"Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure as construed by this Court are applicable without exception to all civil jury trial proceedings including trial proceedings on a civil claim for libel involving rights of free press and free speech within the protection of the First Amendment to the Constitution of the United States. These Rules of Civil Procedure require a trial judge on the trial of such a libel action in ruling on a Motion for a Directed Verdict made on behalf of a defendant and in ruling on a defendant's Motion for Judgment Notwithstanding the Verdict to accept the evidence presented on the trial of the cause in the light most favorable to the plaintiff and to resolve all conflicts in the evidence in favor of the plaintiff and against the defendant. These rules further require such judge to draw all permissible inferences from the evidence in favor of supporting the claim of the plaintiff on a defendant's Motion for a Directed Verdict and Motion for Judgment Notwithstanding the Verdict and to deny said motions and each of them if there is any credible evidence which supports the claims of the plaintiff. In addition

(Continued on next page)

Appellee, in his Response to Appellants' Petition as filed in the Arizona Supreme Court made the contention that the special action procedure is not available because of the fact that an appeal is a remedy which is available. In support of this claim appellee cites only cases decided prior to the adoption of the Rules of Special Procedure on January 1, 1970, and cites no cases subsequent thereto.

As indicated in Appellants' Jurisdictional Statement, the Arizona Supreme Court has accepted and decided cases of far lesser moment than that which was presented through the Appellants' Petition for a Special Action.[2]

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thereto, the aforesaid Rules of Civil Procedure do not permit a trial judge to review the evidence independently of the jury and to judicially determine whether or not the evidence is sufficient to permit the claim of the plaintiff to be submitted to a jury or a judgment to be entered upon a verdict favorable to a plaintiff when challenged by a Motion for Judgment Notwithstanding the Verdict, to stand." (Appellants' Petition, pp. 3, 4)

Appellants presented their claims for relief in the Special Action Petition to the Arizona Supreme Court as follows:

"Petitioners respectfully assert that it is the obligation of this Court in the exercise of its supervisory jurisdiction over the trial courts of this state and in discharge of its obligation to enforce the provisions and requirements of the Constitution of the United States pursuant to the express direction of Article 2, Section 3 of the Arizona Constitution to review the action of the trial court of Maricopa County in this cause and to forthwith suspend and terminate further prosecution of the claims of the respondent Church and terminate the liability and obligation of said judgment to this Court." (Appellants' Petition, pp. 5, 6)

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[2] In *Dollar-A-Day-Rent-A-Car v. Superior Court,* 107 Ariz. 87; 482 P.2d 454, the Arizona Supreme Court reviewed by a special action the refusal of a trial judge to permit a plaintiff to amend the complaint and bring in an additional party defendant. Manifestly, a ready right of appeal was available under the circumstances. Since the Rules of Special Procedure are directly tailored to permit review of abuse of discretion and capricious action by the trial court, it seems hardly reasonable to contend that the Supreme Court would review a mere refusal to permit the amendment of a complaint and the bringing in of an additional party defendant and yet ignore the action of a trial judge which plainly disregarded important constitutional rights of a litigant.

Appellee's response to appellants' request that the Arizona Supreme Court review the trial evidence to ascertain if the litigation should continue was foreseeable.[3]

II

Point 2 — The Final Judgment Question.

Hammerstein v. Superior Court of California, 341 U.S. 491, relied upon by appellee is not controlling. *Hammerstein* involved the failure of the petitioner to appeal a default judgment which this Court recognized as not rising to the dignity of a final judgment because of this, since the default judgment terminated the action only because of the failure of the defendant to appeal. The Court did recognize that the constitutional questions involved by reason of the questions raised in the California court were subject

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[3] Appellee alleged:

"That the petition presents questions previously ruled upon in *Phoenix Newspapers, Inc. vs. Church,* 103 Ariz. 582, 447 P.2d 840 (1968) which constitutes the law of the case. (p. 1 of Response)

* * *

"In its opinion, this Court determined that: (1) the editorial was libelous per se; (2) the editorial was qualifiedly privileged, and (3) sufficient evidence was adduced to prove both 'falsity' and 'actual malice' within the definition of *New York Times vs. Sullivan,* 376 U.S. 254, 84 S.Ct. 719 (1964). * * * The petition at bar omits any reference to this Court's antecedent rulings in *Phoenix Newspapers, Inc. vs. Church* (supra). The reason for such omission is perspicuous. To have referred to this Court's previous rulings *would have a fortiori barred the present petition and this Court's consideration thereof on the basis of the doctrine of the law of the case.* (Emphasis added)

"At bar, petitioners were appellants and the Respondent Church was appellee in *Phoenix Newspapers, Inc. vs. Church* (supra). The rulings of this Court in *Phoenix Newspapers, Inc. vs. Church* (supra) *constitute the law of the case and cannot be presently questioned by petitioners' special action or in any subsequent appeal.* It is fundamental that a formal opinion by an Appellate Court on the merits of a case and the law stated therein is conclusive as the law of the case on a subsequent appeal or other appellate proceeding. See 9 Boston U. L. Review, 225 (1929), Lummus, "The Law of the Case in Massachusetts."

"The doctrine called 'law of the case' is firmly established in a long chain of Arizona decisions beginning with *Snyder vs. Pima County,* 6 Ariz. 41, 53 P. 6 (1898) and including *Alires vs. Southern Pacific Company,* 100 Ariz. 6, 409 P.2d 714 (1966). * * * " (pp. 7, 8 of Response)

to the jurisdiction of this Court, but the Court exercised its discretion and declined to consider them.

In *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, Justice Jackson speaking for this Court said in discussing "finality" as required to give this Court jurisdiction:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete.
>
> * * *
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeny, 1 Pet. (US) 567, 569, 7 L ed 265, 266; United States v. River Rouge Improv. Co., 269 US 411, 414, 70 L ed 339, 343, 46 S Ct 144; Cobbledick v. United States, 309 US 323, 328, 84 L ed 783, 786, 60 S Ct 540.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. * * * "
> 93 L.ed. at 1536

Appellee has not dealt with appellants' claim (p. 7 Jur. Stmt.) that the failure of the trial court to accept its responsibility of independently reviewing the evidence and protecting appellants' First Amendment rights against continuing legal harassment immediately it becomes clear that the plaintiff's claims run afoul of First Amendment guarantees and that the refusal by the Arizona Supreme Court to free appellants from the "chilling effect" of continued unwarranted legal harassment upon the opportunity becoming legally available to it to act upon appellants' claims of invasion of their First Amendment rights *constitutes a final denial of this independent constitutional right of appellants "separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to*

require that appellate consideration be deferred until the whole case is adjudicated."

If, in fact, continuation of libel litigation after it clearly appears the evidence fails to meet standards as explicated in *Times* and following cases constitutes an invasion of First Amendment rights of a newspaper publisher, then appellants have indeed been finally denied protection for these rights by both the Arizona trial court and the Arizona Supreme Court.

If appellants had not sought relief in the Arizona Supreme Court from the arbitrary and capricious action of the trial judge in denying appellants a judicial review of the sufficiency of the evidence to meet First Amendment free speech — free press requirements by their Petition for Special Action, it might be properly claimed this important federal right had not been finally denied by the Arizona courts. Appellants did exhaust all avenues available to them in the state courts and have been rebuffed at both the trial and the highest appellate court level.

Under the Arizona court system litigants claiming First Amendment rights in civil libel damage litigation, as compared to similar litigants in the federal system, are "second class citizens" denied ready protection at the earliest practical date for their First Amendment rights. Cf. *Time, Inc. v. McLaney,* 406 F.2d 565, at 566 (5th Cir. 1969); *Thompson v. Evening Star Newspaper Company,* 394 F.2d 774, at 776 (D.C. Cir. 1968); *Washington Post Company v. Keogh,* 365 F.2d 965, at 968 (D.C. Cir. 1966).

Appellants concede that they did not believe appellee was a communist when the editorial complained of was written. The Arizona Supreme Court has determined that as a matter of law the editorial accused appellee of being a communist — a libelous *per se* publication. And the Arizona Court has concluded that the mere lack of a belief that appellee was a communist in vigorously attacking appellee's views constitutes "knowing falsehood or reckless disregard for the truth."

Appellants seek relief in this Court because they have been, as a practical matter, finally denied their constitutional rights of

free speech and free press in the state courts of Arizona at least in part. This is true because there is no substantial claim that the evidence on the second trial of this cause differed in any substantial degree from the evidence on the first trial which was reviewed and appraised by the Arizona Supreme Court on the appeal from the judgment following the first trial. (App. Jur. Stmt., p. 5). There is no contention that any new or additional evidence is available to appellants should this cause be reversed for a new trial by the Arizona Supreme Court.

As appellee points out (the relevance of the fact remains obscure) appellants have protected their right to appeal to the Arizona Supreme Court by filing a Notice of Appeal to that Court within the required time.

However, if this Court refuses to review appellants' rights at this point, what are the alternatives which confront appellants?

The Arizona Supreme Court has finally passed upon appellants' First Amendment claims — emphatically and adversely to appellants. If, therefore, after the appeal briefs are written and the appeal is argued the Arizona Supreme Court finds no state law error sufficient to require reversal and affirms the judgment, appellants can then again seek relief in this Court in vindication of their First Amendment rights, meanwhile bearing the "chilling" burden of a $500,000 libel damage judgment and the expense of an unnecessary appeal to the Arizona Supreme Court.

If, however, the Arizona Supreme Court finds state law reversible error on the appeal then appellants face the further dreary and hopeless task, under facts and law established through two trials of this cause and one appeal, of girding their loins for the state trial court fray again, faced with an effective bar of recourse to their only real defense, their First Amendment rights, by Arizona's "law of the case" rule. And then the inevitable appeal to the Arizona Supreme Court to be again confronted with the "law of the case" and effective exclusion from their only real defense, their First Amendment rights.

III

Point 3 — No Substantial Federal Question is Presented.

Apparently appellee agrees with the Arizona state courts that the First Amendment freedoms are not "great freedoms" and that this Court did not really mean what it said in *Times v. Sullivan,* supra, and *Rosenbloom v. Metromedia,* ..... U.S. ....., 29 L.Ed.2d 296, 91 S.Ct. ..... (1971) (among others) that unjustified civil libel damage litigation involving First Amendment rights constitutes a serious invasion of the constitutional rights of a newspaper publisher.

The United States District Courts and the United States Courts of Appeal have found the constitutional rights which appellants would vindicate by this appeal to be important federal rights. (See cases p. 6 ante). Certainly to this point appellants have been denied the First Amendment rights which the federal system has recognized and effectively protected through District Court and Courts of Appeal review of the evidence at "the earliest practical time" to make sure that these "great freedoms" of free speech and free press may flourish and that the "chilling effect" of continued litigation of unsupported libel claims be prevented.

At this point these same federal rights have been finally denied appellants.

The Motion of Appellee should be denied.

Probable jurisdiction should be noted or the appeal be treated as a Petition for a Writ of Certiorari and so treated, granted.

Respectfully submitted,

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